BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARTHUR M. DAVIS Claimant VS.	)	
	)	Docket No. 187,669
ARTHUR M. DAVIS Respondent AND	)	
VANLINER INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant requested review of the Award entered by Special Administrative Law Judge William F. Morrissey dated June 29, 1995. The Appeals Board heard oral argument on November 21, 1995.

APPEARANCES

Claimant appeared by his attorney, Terri Z. Austenfeld of Overland Park, Kansas. The respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Kansas.

RECORD

The record reviewed by the Appeals Board and the parties' stipulations are listed in the Award.

STIPULATIONS

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 12.5 percent functional impairment rating.

ISSUES

Claimant requested review of the Award and asks the Appeals Board to review the Judge's findings regarding (1) average weekly wage, (2) nature and extent of disability, and (3) whether respondent is entitled credit in this proceeding for monies paid claimant under Missouri's workers compensation laws. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Special Administrative Law Judge should be modified.

The parties stipulated that on July 9, 1993 claimant met with personal injury by accident arising out of and in the course of his employment with the respondent. On that date claimant hurt his neck and low back while helping move a piano down a flight of stairs. The accident occurred in the state of New York.

After returning from New York, claimant initially sought medical treatment from Topeka's Dr. Nabours who referred him to another local physician, Dr. Payne. Eventually, claimant also saw Drs. Hanson, Reed, and Tillema.

At the time of the accident, claimant was a cross-country truck driver who was purchasing his truck from Topeka Transfer and Storage and was under contract to move furniture for United Van Lines. Before the July 9, 1993 injury, claimant had given notice to United Van Lines he was terminating as of July 28, 1993.

Claimant testified he continued to work through July 28, 1993 to fulfill his contractual obligations to United Van Lines. However, after the accident claimant could neither load nor unload his truck and hired others to perform that task. After leaving work on July 28, 1993, claimant has not returned to work since that date although he was released by Dr. Reed in March 1994. Claimant, who is 39 years old and has an eighth grade education, testified he believes he is unable to perform any of the former jobs he held over the past 15 years because his low back cannot tolerate the bouncing from riding in a car or truck, and driving hurts his neck and arms. Claimant testified that during the 15-year period before his July 1993 accident he worked as an over-the-road furniture mover, at a motorcycle repair shop, as a cement truck driver and at a salvage yard.

(1) **Average weekly wage.**

Claimant testified he only worked for United Van Lines between January 1 and July 28, 1993. Claimant's 1993 income tax return was admitted into evidence. From that document's Schedule C the Special Administrative Law Judge took the $11,600.00 net profit claimant earned from truck driving and divided it by 29.86 weeks, the number of weeks between January 1 and July 28, 1993, and found an average weekly wage of $388.48.

Claimant contends the average weekly wage is $760.62 which is derived by dividing $14,412.50 by 20 weeks. Claimant contends the net profit of $11,600.00 shown on the 1993 Schedule C should be combined with meal expense in the estimated sum of $2,812.50 to obtain the sum of $14,412.50 which claimant contends represents the total value of economic gain that claimant derived for the six-month period before the July 9, 1993 accident. Claimant also contends the number of weeks claimant worked should be reduced by seven because he testified he was off work on vacation or leave of absence the following weeks: January 1-5, January 18-26, February 9-14, March 14-20, April 9-17, May 7-18, and June 1-7. Claimant cites K.S.A. 44-511(b)(5) in support of his position.

Because claimant's accountant did not provide the actual meal expense amount on the form Schedule C in the appropriate space, respondent contends that claimant did not establish the amount of meal expense that he claims should be considered in the computation of average weekly wage. Respondent also contends the average weekly wage computation must not omit the seven weeks claimant did not work because he was

not off necessarily due to vacation, leave of absence, sick leave, illness or injury as required by K.S.A. 44-511(b)(5).

Because claimant continued to work through July 28, 1993, the income reported in the 1993 tax return includes income earned after the date of accident. Claimant did not present evidence to establish what portion of the income and expenses shown on his tax returns represented the period before his accident. Therefore, the Appeals Board must attempt to determine claimant's average weekly wage in the fairest manner possible despite lacking the information required to determine the issue with greater certainty.

Based upon the information available the Appeals Board finds claimant's average weekly wage to be $507.44 which is computed by dividing the $11,600 net profit amount shown on the Schedule C by 22.86 weeks. The 22.86 weeks used as the divisor in this computation is determined by subtracting the seven weeks that claimant was on vacation and did not work from the 29.86-week period the income figures represent.

Although it is arguable the amount of meal expense should be included in the computation of average weekly wage, the Appeals Board finds claimant has failed to establish the amount claimant expended for that purpose. In light of the fact the appropriate line to enter that information on claimant's Schedule C is blank, the Appeals Board is not persuaded by claimant's testimony that meal expense approximated 25 percent of the total sum expended altogether for travel, meals, and entertainment as shown on the tax form. Claimant neither produced the records or receipts he allegedly previously furnished his accountant to prepare his tax return nor testimony from his accountant to support his contention regarding the amount of meal expense.

The Appeals Board finds that using 22.86 weeks to determine the average weekly wage is reasonable and proper under the circumstances. As indicated by the Special Administrative Law Judge, claimant netted $11,600 from his truck driving from the period January 1, 1993 through July 28, 1993, a period of 29.86 weeks. Because claimant did not work for an entire work week on seven different occasions during the period in question, those seven weeks should not be counted in determining claimant's average weekly wage. Claimant's contention that K.S.A. 44-511(b)(5) is applicable, is correct. That statute provides in pertinent part:

> "[W]orkweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered."

(2) **Nature and extent of disability.**

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon his functional impairment rating which the parties had stipulated to be 12.5 percent.

Because his is a "nonscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general

> disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Claimant contends he is entitled to an 89 percent work disability under K.S.A. 44-510e and argues the Special Administrative Law Judge erred by finding there was no testimony from a physician regarding task loss and by finding that claimant could continue to perform truck driving jobs and earn a comparable wage.

Respondent contends claimant voluntarily terminated his agreement with United Van Lines and retains both the ability to drive trucks and earn 90 percent of his pre-injury wage. Therefore, respondent argues claimant is not entitled to a permanent partial disability greater than the functional impairment rating.

Respondent presented the testimony of board-certified orthopedic surgeon William O. Reed, Jr., M.D. He first saw and examined claimant on December 2, 1993 and formed an initial impression that claimant had severe cervical spine sprain or strain. The doctor obtained an MRI scan that indicated degenerative arthritis and degenerative disc disease in the cervical spine and a calcified disc at the C5-6 intervertebral level. Dr. Reed next saw claimant on January 4, 1994 and sent claimant for epidural steroid injections to the cervical spine which reportedly relieved 50 percent of claimant's neck pain. The doctor next referred claimant to work hardening and later saw him in follow-up on January 18, February 8 and March 7, 1994.

In his letter dated March 7, 1994, Dr. Reed indicates claimant's July 1993 injury aggravated arthritic conditions and caused soft tissue injury to the lumbar and cervical spine. The same document also indicates claimant could occasionally lift 35 pounds, frequently lift 15 pounds, and continuously lift 5 pounds.

Dr. Reed testified that he found moderately significant symptom magnification and that he placed restrictions upon claimant based upon his subjective complaints of pain. He also indicated he found no objective abnormalities on physical examination or structural abnormalities of the cervical or lumbar spine to support restrictions. Dr. Reed formulated the weightlifting restrictions tailored to claimant's reports of pain during a functional capacity evaluation. Further, the doctor testified that claimant was not restricted from driving trucks and that claimant's restrictions would change with changes in his subjective complaints. Neither counsel asked Dr. Reed if he believed claimant's symptom magnification was feigned or if claimant was a malingerer. Also, neither party asked the doctor to express an opinion regarding task loss.

Claimant presented the testimony of board-certified orthopedic surgeon David A. Tillema, M.D. He saw claimant on March 14, 1994 and formed an initial impression that claimant had cervical spondylosis and degenerative changes of the lumbar spine. Dr. Tillema feels the July 1993 accident aggravated preexisting cervical spondylosis and arthritis. He also believes the restrictions placed upon claimant by Dr. Reed are quite appropriate.

When asked about claimant's work activities and the past jobs that claimant had performed, Dr. Tillema testified that it would be inappropriate for claimant to drive over the road and move furniture day in and day out, and that claimant should be restricted from loading and unloading furniture. Although the record is not entirely clear, it appears Dr. Tillema would restrict claimant from packing crates because of the lifting and bending that may be required. The doctor would also restrict the claimant from lifting heavy parts associated with removing auto parts from vehicles and loading those parts into customer's vehicles or placing them on shelves.

Claimant also presented the testimony of vocational rehabilitation counsellor Michael Dreiling. He testified that he identified nine essential tasks that claimant performed over the last 15 years: (1) loading furniture, (2) unloading furniture, (3) repairing motorcycles, (4) removing auto parts, (5) loading auto parts, (6) crating and packing furniture and household goods, (7) paperwork, (8) selling, and (9) driving.

Respondent presented the testimony of vocational rehabilitation counsellor, Bud Langston. He testified claimant retains the ability to earn $21,000 per year assuming he can return to over-the-road driving and avoid loading activities. Mr. Langston's report dated November 25, 1994 was introduced as an exhibit at his deposition and contains both a work history similar to that provided by claimant in his testimony and the history utilized by Mr. Dreiling in his analysis of claimant's past tasks. Mr. Langston identified the following job tasks that claimant performed over the 15-year period before the date of accident: (1) driver, (2) driver's helper, (3) packer, (4) automobile wrecker, (5) motorcycle repair, and (6) cement truck driver.

Based upon the evidence presented, the Appeals Board finds claimant has a 56 percent loss of ability to perform those tasks he performed in substantial and gainful employment over the 15-year period before the date of accident. Because Dr. Reed was a treating physician and saw claimant on a number of occasions, the Appeals Board finds his opinion credible that claimant retains the ability to drive. Therefore, the Appeals Board finds claimant is unable to perform five tasks out of a total of nine tasks which he performed over the last 15 years utilizing Dr. Reed's restrictions. Based upon Dr. Tillema's testimony, who utilized Dr. Reed's restrictions, the Appeals Board finds claimant is no longer able to perform the following five tasks: load and unload furniture, perform motorcycle teardown and repair, remove auto parts from salvage vehicles, load or store salvaged auto parts, and crate and pack household furniture and goods. However, the Appeals Board finds claimant is able to perform the following four tasks: cross-country truck driving, cement truck driving, maintaining paperwork and logs, and selling.

Respondent asks the Appeals Board to impute a 90 percent post-injury wage because Mr. Langston testified that driving jobs do exist in the open labor market that claimant could perform without being required to load and unload and earn a comparable wage.

Despite applying for some jobs, at the time of regular hearing claimant had not obtained employment. Therefore, in the absence of proof of wrongdoing or an attempt to wrongfully manipulate his workers compensation benefits, post-injury wages are not to be imputed and K.S.A. 44-510e requires the trier of fact to use 100 percent as the difference between the average weekly wage claimant was earning before and after the injury. In this proceeding, there is no evidence that claimant has wrongfully attempted to manipulate his workers compensation claim by refusing to either look for or accept employment.

As required by K.S.A. 44-510e, the Appeals Board averages the 56 percent task loss with the 100 percent difference in pre- and post-injury wage and finds claimant has a 78 percent permanent partial general disability.

(3) **Credit for compensation paid.**

Respondent is entitled to credit for any benefits paid to claimant on behalf of the respondent for this work-related injury under the Missouri workers compensation laws. K.S.A. 44-525 provides that credit shall be given to the employer for any amounts paid as compensation prior to the date of the award. Therefore, as long as compensation is paid to the claimant by or on behalf of the respondent for this work-related injury, respondent is entitled to credit whether or not it is paid under the Kansas Workers Compensation Act or the provisions of a sister-state's workers compensation law.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award by Special Administrative Law Judge William F. Morrissey dated June 29, 1995 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Arthur M. Davis, and against the respondent, Arthur M. Davis, and its insurance carrier, Vanliner Insurance Company, for an accidental injury which occurred July 9, 1993 and based upon an average weekly wage of $507.44, for 35 weeks of temporary total disability compensation at the rate of $313.00 per week or $10,955.00, followed by 308.10 weeks at the rate of $313.00 per week or $96,435.30 for a 78% permanent partial general body impairment of function, making a total award not to exceed $100,000.00.

As of April 30, 1996, there is due and owing claimant 35 weeks of temporary total disability compensation at the rate of $313.00 per week or $10,955.00, followed by 111.57 weeks of permanent partial disability compensation at the rate of $313.00 per week in the sum of $34,921.41, for a total of $45,876.41 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $54,123.59 is to be paid for 172.92 weeks at the rate of $313.00 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terri Z. Austenfeld, Overland Park, KS
Stephen P. Doherty, Kansas City, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director